No. 77-1268

In the Supreme Court of the United States

OCTOBER TERM, 1977

HERBERT LEO PALM, PETITIONER

v.

VETERANS ADMINISTRATION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. On August 2, 1974, petitioner wrote a letter to the Veterans Administration, contending that in September and October 1965 doctors in the Veterans Administration Outpatient Clinic, New York, New York, and the Kingsbridge Veterans Administration Hospital, Bronx, New York, committed medical malpractice in his treatment (Pet. App. 1e). The Veterans Administration informed him that the claim was barred because he had not filed an administrative claim within the two-year period provided by the Federal Tort Claims Act, 28 U.S.C. 2401(b) (Pet. App. 1e-2e).

In February 1975 petitioner brought this suit under the Federal Tort Claims Act in the United States District Court for the Southern District of New York (Pet. 9; Pet.

App. 1b). The district court dismissed the action on the ground that it was time-barred under 28 U.S.C. 2401(b). Petitioner then filed a motion for relief from the judgment pursuant to Fed. R. Civ. P. 60(b), presenting what he contended was new evidence relating to factors (including sanity) that might toll the time limitations. On January 28, 1977, the district court denied petitioner's motion, explaining that insanity does not toll the statute of limitations under the Federal Tort Claims Act (Pet. App. 1c-2c). The court of appeals affirmed (Pet. App. 1a-2a).[1]

2. The lower courts correctly held that petitioner's action is time-barred. Under the Federal Tort Claims Act, a plaintiff's claim for medical malpractice accrues when he knows, or in the exercise of due diligence has reason to know, that he has been injured. *Brown* v. *United States*, 353 F. 2d 578, 579 (C.A. 9); *Quinton* v. *United States*, 304 F. 2d 234, 240-241 (C.A. 5). Although petitioner knew or should have known in 1965—the time of the alleged malpractice—that he might have been injured (Pet. 7-8; Pet. App. 1b), he delayed presenting that claim to the Veterans Administration for nine years.

Petitioner appears to contend (Pet. 4, 14, 16, 18) that the limitation period was tolled by his mental incompetence and because he was under the continuing treatment of the same physician during the relevant period. Mental incompetence, however, does not toll the statute of limitations under the Federal Tort Claims Act. *Casias* v. *United States*, 532 F. 2d 1339, 1342 (C.A. 10); *Accardi* v. *United States*, 435 F. 2d 1239, 1241 (C.A. 3).

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[1]Petitioner alludes (Pet. 8-9) to another action in which he sought a writ of mandamus to require the government to investigate alleged criminal conduct directed at him and to provide protection for him at a United States consulate. The district court dismissed the action (Pet. App. 1f-3f), and petitioner did not appeal.

And even if continuing treatment by a single physician tolls the statute of limitations when it creates a lulling effect (but see *Tyminski* v. *United States*, 481 F. 2d 257, 264 n. 5 (C.A. 3); *Ashley* v. *United States*, 413 F. 2d 490 (C.A. 9)), there is no evidence that petitioner was under the treatment of the same physician after 1965. To the contrary, petitioner apparently sought medical care at other institutions both in this country and abroad (Pet. 15-16, 18).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1978.

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[2]Petitioner also appears to contend (Pet. 25-28) that he was prevented by "duress" from filing his claim in a timely manner. He admits (Pet. 25-26) that he did not present this theory, or evidence to support it, to the district court, but contends that the district court should have considered this theory nonetheless because duress was alleged in petitioner's contemporaneous mandamus action (see n. 1, *supra*). But the district court could not have taken judicial notice of petitioner's assertions concerning duress made in connection with the independent mandamus suit even if it had been asked to do so; the assertions were "subject to reasonable dispute," and therefore the court was not authorized to take notice of them. Fed. R. Evid. 201(b). In any event, petitioner was in the best position to inform the court of the circumstances that would support his suit.

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